In The

Supreme Court Of The United States

October Term, 1958

No. 29

THE DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY *Petitioner,*

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Respondent.*

On Petition For Writ of Certiorari To The United States Court of Appeals For the Sixth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases-continued: **Page(s)**

Statutes:

In The

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BRIEF OF RESPONDENT IN OPPOSITION

This brief is filed by the United Transportation Union, successor organization to the Brotherhood of Locomotive Firemen and Enginemen named as respondent herein. The United Transportation Union, with headquarters and principal offices at 666 Euclid Avenue, Cleveland, Ohio, is a new union formed by the merger, effective January 1, 1969, of the Brotherhood of Locomotive Firemen and Enginemen, the Brotherhood of Railroad Trainmen, the Switchmen's Union of North America, and the Order of Railway Conductors and Brakemen. It is comprised of the former members of said organizations, and has succeeded to and assumed all the rights and obligations of said four organizations.

QUESTION PRESENTED

May a court enjoin a carrier from unilaterally effecting changes in its employees' working conditions, prior to exhaustion of the Railway Labor Act's major disputes handling machinery invoked by a union's notice demanding a new contract provision which would modify the existing contract so as to prohibit the changes in question, while the dispute is pending before the National Mediation Board upon its acceptance of jurisdiction?

STATEMENT OF THE CASE

Petitioner's statement of the facts involved, while somewhat abbreviated and incomplete, is for the most part substantially accurate and will only be briefly supplemented here.

Prior to the events resulting in this litigation, petitioner The Detroit and Toledo Shore Line Railroad Company had throughout its history maintained only one home terminal or point of reporting for duty for its train and engine service employees, at Lang Yard in Toledo, Ohio. However, commencing in 1961 it sought to establish certain assignments to originate at Trenton, Michigan, some 33 miles away, and respondent Brotherhood of Locomotive Firemen and Enginemen (BLF&E) and the Brotherhood of Railroad Trainmen (BRT), a co-defendant in this action, sought through Section 6 notices under the Railway Labor Act (45 U.S.C. Sec. 151 et seq.) to obtain contractual protective conditions for employees who would be affected (pp. 8a, 11a-12a).[1]

The resulting dispute was handled to a conclusion under the major disputes machinery of the statute without agreement being reached, and on March 4, 1963, following refusal of the parties to arbitrate, the National Mediation Board

[1] Appendix to Petition for Certiorari.

terminated its services, leaving the parties free to resort to self-help (pp. 26a-27a).

The Shore Line, however, did not at that time make any move to create the new assignments at Trenton, which had been the subject of the dispute. Instead, on September 24, 1963, it created new assignments for the manning of a work train to operate out of Dearoad, Michigan, eleven miles from Trenton (p. 32a). The BLF&E then challenged creation of the Dearoad assignments as a contract violation (p. 9a) and withdrew its Section 6 notice seeking protective conditions at Trenton, the Shore Line having represented that it had abandoned its intention to establish a terminal point there (p. 27a).

Following rejection of this breach of contract claim by a Special Board of Adjustment on November 30, 1965 (pp. 32a-33a), the Shore Line revived its plans for Trenton, and on January 27, 1966, the BLF&E served a new Section 6 notice for an amendment to its existing agreement to provide that "all road service runs and/or assignments will originate and terminate at Lang Yard . . . . " (pp. 9a, 27a).

The parties were unable to reach agreement and on May 26, 1966, Shore Line posted a bulletin advising of its intention to establish certain assignments to operate out of Trenton commencing June 1 and 2, 1966 (P.A. 53a).[2] On May 27, 1966, BLF&E's President invoked the services of the National Mediation Board by telegram (P.A. 55a), followed by a formal application for the Board's services under date of June 17, 1966 (P.A. 60a). In the meantime Shore Line elected to cancel the assignments which it had bulletined on May 26 (P.A. 56a).

The National Mediation Board accepted jurisdiction of the dispute and docketed it as its Case No. A-7839, advising

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[2] Plaintiff-Appellant's Appendix in the court below.

on June 28, 1966, that "A mediator will be assigned to mediate this dispute consistent with prior commitments" (D.A. 93b).[3]

On September 19, 1966, Shore Line again posted a bulletin announcing assignments originating at Trenton, whereupon the President of the BLF&E requested prompt assignment of a mediator by the Board (D.A. 94b); and the Board replied on September 26, 1966, stating that it would endeavor to comply as soon as possible (D.A. 95b).

On September 23, 1966, the Shore Line filed its complaint seeking an injunction against a strike by the BLF&E and the BRT. BLF&E counterclaimed for an injunction against the Shore Line compelling compliance with the mandates of the Railway Labor Act respecting maintenance of the *status quo*. The trial court denied the Shore Line's complaint against both defendants, and no appeal was taken as to the claim against BRT. The counterclaim of BLF&E was granted by the trial court, and sustained on appeal by the judgment sought to be reviewed.

ARGUMENT

It would be difficult to imagine anything more disruptive to the system of voluntary collective bargaining under the Railway Labor Act, or better calculated to defeat the Congressional purpose of avoiding interruptions to commerce through negotiation and conference, mediation, conciliation, and even investigation and recommendations by Presidential Emergency Boards, than the proposition, urged here by Shore Line, that while its employees are bound to pursue these steps to a conclusion before their admitted right to use economic self-help in a major dispute matures, the carrier may achieve its end by unilateral action with re-

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[3] Defendant-Appellee's Appendix in the court below.

spect to the very subject matter of the dispute, unhampered by any waiting periods or obligation to maintain the *status quo* existing when the dispute arose. What is contended by Shore Line would make a mockery of the statutory *status quo* requirements, *for what it is saying is that these do not apply unless it is already prevented by contract from making the unilateral changes in question.*

The District Court and the Court of Appeals properly rejected this contention, and their holdings are in accord with the provisions of the Railway Labor Act and the decisions of this court. There is no substantial body of authority to the contrary.

The decisions below do not stand for the proposition that *absent a pending major dispute being progressed in accordance with the statutory scheme* a carrier may not make operating changes where existing agreements do not restrict or prohibit the proposed action. But they do hold that where as here the changes in question have been made the subject of a notice, under Section 6 of the Act, seeking new contractual provisions which would control, and when the National Mediation Board has taken jurisdiction over the dispute, the carrier, as well as its employees, must postpone action until the statutory procedures for inducing agreement have run their course.

1. The decision below is in accord with the provisions of the Railway Labor Act setting forth the procedures to be followed and the conditions which must be observed in the handling of major disputes over the making or changing of collective bargaining agreements. These statutory provisions evidence the heavy reliance placed by Congress upon the National Mediation Board, and upon the implementation of the Act's voluntary procedures by "cooling off" periods during which the *status quo* was to be main-

tained by all parties, to achieve the statutory purpose of avoiding strikes and interruptions to commerce in major disputes.

When *either* party has set the Act's procedures in motion by serving notice of contract proposals under Section 6, the statutory prohibitions against changes in the *status quo* become operative. In the sections of the Act dealing with major disputes, the changes specifically prohibited are those in "rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose" (Section 5 First (b)); "rates of pay, rules or working conditions" (Section 6); and "the conditions out of which the dispute arose" (Section 10). Nowhere in those portions of the Act governing the handling of major disputes is there any indication that these *status quo* requirements are to be defined and limited by the scope of existing contract obligations.

Section 2 Seventh of the Act provides that a carrier may not change "rates of pay, rules, or working conditions of its employees, as a class *as embodied in agreements* except in the manner prescribed in such agreements or in Section 6 of the Act." The Shore Line argues that the other provisions of the statute should be read as if they included the italicized portion of Section 2 Seventh, thus narrowing the scope of the *status quo* required to be maintained during the processing of major disputes. But Section 2 Seventh does not even deal with the handling of major disputes nor does it purport to impose any *status quo* requirements in

connection therewith. Its effect, rather, is merely to attach legal and binding effect to collective labor agreements,[4] and to prohibit their unilateral change or abrogation by carriers.

2. The decision below is supported by previous decisions of this Court and other federal courts, and there is no substantial body of pertinent authority to the contrary.

The courts have long recognized the obligations imposed by the Railway Labor Act for the maintenance of the *status quo* until the statutory procedures for the handling of major disputes are exhausted. Thus in *Elgin, Joliet and Eastern R. Co. v. Burley*, 325 U.S. 711, 725, this Court said:

> "... The parties are required to submit to the successive procedures designed to induce agreement. Sec. 5 First (b). But compulsions go only to insure that *those procedures are exhausted before resort can be had to self-help.*" (Emphasis supplied.)

That the mandatory duty to bargain collectively in accordance with the procedures of the Railway Labor Act is equally applicable to carriers and their employees is further pointed up by footnotes 12, 18, and 26 to the opinion in the *E., J. & E.* case. (325 U.S. 711, at pp. 721, 725, and 730.)

Even apart from the specific *status quo* requirements of the Railway Labor Act, this Court has squarely held that the duty to bargain collectively carries with it the requirement to refrain from unilateral action, during the bar-

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[4]This is a matter as to which there was considerable doubt at the time of enactment of the Railway Labor Act. See *J. I. Case Co. v. National Lab. Rel. Bd.*, 321 U.S. 332, and annotation at 88 L. Ed. 770, 772-773.

gaining process, with respect to the subject matter being negotiated. In *N.L.R.B. v. Katz,* 369 U.S. 736, 743, the Court said:

> "... We hold that an employer's unilateral change in conditions of employment under negotiation is similarly a violation of Section 8 (a) (5), for it is a circumvention of the duty to negotiate which frustrates the objectives of Section 8 (a) (5) much as does a flat refusal."

To similar effect is the Court's decision in *Fibreboard Corp. v. NLRB,* 379 U.S. 203, sustaining an order of the National Labor Relations Board "... restoring the status quo ante to insure meaningful bargaining ..." (379 U.S. at p. 216).

Other decisions of this Court and other federal courts have recognized both the existence of the requirement to maintain the *status quo* during the handling of major disputes, and its applicability to railroads as well as their employees. One of the most recent decisions in point is that in *Brotherhood of Loc. Eng. v. B. & O. Co.,* 372 U.S. 284 (1963), where the court quoted its previous language (above) from the *E., J. & E.* case, and reaffirmed the proposition that the question of whether the major disputes handling procedures had been exhausted was determinative of a carrier's right to proceed with changes in the *status quo.* The principle was reiterated in *Railway Employes v. Florida E. C. R. Co.,* 384 U.S. 238. See also the decision of the Court of Appeals for the Fifth Circuit in the same litigation, reported as *Florida E.C. Ry. Co. v. Brotherhood of R. Trainmen,* 336 F. (2d) 172, and cases cited.

Additional cases have recognized the principle. Thus, in

Manning v. American Airlines, Inc., 329 F. (2d) 32 (C.A. 2, 1964), the court said:

> "The propriety of an injunction to enforce the then unique provisions of the Railway Labor Act for maintaining the *status quo* while the parties to a labor dispute pursue various stages of negotiation, mediation, or arbitration, was established long ago. Texas & N.O.R.R. v. Brotherhood of Ry. Clerks, 281 U.S. 548, 565-566, 50 S. Ct. 88, 74 L. Ed. 608 (1930). Although the Texas & N. O. decision antedated the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115, the debates on that Act, 75 Cong. Rec. 5503-04 (1932), made clear that it was not intended to apply to injunctions of this nature. See Railroad Yardmasters v. Pennsylvania R. R., 224 F. 2d. 226 (3 Cir. 1955); Chicago, R. I. & P. R. R. v. Switchmen's Union, 292 F. 2d 61, 63-64, 66 (2 Cir. 1961), cert. denied, 370 U.S. 936, 82 S. Ct. 1578, 8 L. Ed. 2d 806 (1962)."

And, in concluding its opinion, the court remarked:

> "The purpose of Section 6 was to prevent rocking of the boat by either side until the procedures of the Railway Labor Act were exhausted . . . ."

Similarly, in *Brotherhood of Railroad Trainmen v. Akron & B. B. R. Co.*, 385 F. (2d) 581, 597 (C.A.D.C., 1967), cert. den. 390 U.S. 951, the court observed:

> ". . . If we turn from speculation about legislative intent to the realities of the Railway Labor Act, we are aware that the conferences triggered by Section 6 notices are typically the beginning and not the end of the statutory procedures. If conferences proposed by a Section 6 notice are unavailing either party can invoke the services of the National Mediation Board. *While negotiations continue or the Board has jurisdiction, no self-help is permitted.*

> The parties are free to submit their controversy to arbitration. If none of these techniques resolves the matter, the President may convene an emergency board to investigate the dispute and report back on the issues. *Only when all these steps have been exhausted are the parties free to act unilaterally.*" (Emphasis supplied.)

Other cases which support the decision of the court below requiring plaintiff to maintain the *status quo*, are *Butte, Anaconda & Pac. Ry. Co. v. Brotherhood of L. F. & E.*, 168 F. Supp. 911, aff'd. 268 F. (2d) 54 (C.A. 9, 1959); *Baltimore & Ohio R. Co. v. United Railroad Wkrs., etc.*, 271 F. (2d) 87, 90 (C.A. 2, 1959); and *Spokane, Portland & Seattle Ry. Co. v. Order of Railway C. & B.*, 265 F. Supp. 892, 894.

Here as in the court below, Shore Line relies heavily on the case of *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386 (1942). The facts and issues in that case are not remotely analagous to those presented here. There was no existing collective bargaining agreement in effect, nor any prior history of bargaining; *the National Mediation Board had not taken jurisdiction; there was not even any pending demand for an agreement on the subject matter of the change put into effect by the carrier;* and the case dealt primarily with statutory minimum wage requirements of the then newly enacted Fair Labor Standards Act.

Moreover, the *Williams* decision seems to have turned to a large extent upon the Court's feeling that the carrier's unilateral action, the promulgation of individual contracts of employment with its red caps, was not controlled by the Railway Labor Act. Thus, the Court said:

> ". . . Because the carrier was, by the act, placed under the duty to exert every effort to make collec-

tive agreements, it does not follow that pending those negotiations, where no collective bargaining agreements are or have been in effect, the carrier cannot exercise its authority to arrange its business relations with its employees in the manner shown in this record. As we have stated in discussing the Jacksonville case, the Railway Labor Act dealt with collective bargaining agreements only and not with the employment of individuals. This conclusion is pertinent in considering the effect of the Dallas request for collective bargaining." (315 U.S., at p. 402.)

This rationale of the *Williams* decision would appear to be of doubtful validity in the light of the companion decisions of this Court, two years later, in *J. I. Case. Co. v. National Lab. Rel. Bd.*, 321 U.S. 332 (1944) and *Order of R. Telegraphers v. Railway Exp. Agency*, 321 U.S. 342 (1944), holding invalid individual employment contracts negotiated in the face of the duty to bargain collectively.

The other decision of this Court cited by petitioner as contrary to the decision below, *Order of Railroad Conductors v. Pitney*, 326 U.S. 561 (1946), did not involve the question of a carrier's right to make unilateral changes during negotiations or mediation pursuant to a union's Section 6 notice, but rather the question of whether existing agreements controlled the subject matter of the changes, so that the *carrier* could not put them into effect without itself seeking amendment of the existing agreements pursuant to Section 6. As we have noted above, the decision below does not hold that absent a pending major dispute being progressed in accordance with the Act, a carrier may not make operating changes not barred by existing agreements.

Petitioner Shore Line has cited a number of lower federal court decisions where the claimed conflict with the

decision below is similarly without merit when the facts and actual holdings of the courts are examined.

Thus, *Hilbert v. Pennsylvania R. Co.*, 290 F. (2d) 881 (C. A. 7, 1961), and *Rutland Ry. Corp. v. Brotherhood of Locomotive Eng.*, 307 F. (2d) 21 (C.A. 2, 1962), involved minor as well as major disputes. They involved Section 6 notices served by the carrier, not the union, and the changes in working conditions were put into effect by the carriers under a claim that they were permitted under existing agreements, thus creating minor disputes for the National Railroad Adjustment Board. In *Illinois Central R. Co. v. Brotherhood of Railroad Train.*, 398 F. (2d) 973 (C.A. 7, 1968), it appears from the *per curiam* opinion of the Court of Appeals that the end product of the litigation was a remand of the case to the District Court for entry of an appropriate *status quo* order preserving established practices which a statutory arbitration board, Public Law Board No. 79, had found, during the pendency of the appeal, to be as contended by the Brotherhood. And the case of *Southern Ry. Co. v. Brotherhood of Locomotive Firemen, etc.*, 337 F. (2d) 127 (C.A.D.C., 1964), like the *Hilbert* and *Rutland* cases, involved a Section 6 notice by the carrier, and an injunction requiring the carrier to maintain the *status quo* alternatively until the major disputes procedures had been exhausted, or until an award of the National Railroad Adjustment Board might establish, by interpretation of existing agreements, that the carrier could have put the operating changes into effect without seeking amendment of its agreements under Section 6. Again, the case does not hold that a carrier may make unilateral changes in the subject matter of pending negotiation or mediation on a union's Section 6 notice. Finally, the case of *Norfolk & P.B.L.R. Co. v. Brotherhood of Rail. Train.*, 248 F. (2d) 34 (C.A. 4, 1957),

is not in point. It involved a dispute jurisdiction of which had been refused by the Mediation Board, and simply held that it was unlawful for the Brotherhood to strike over what was held to be a minor dispute.

The unreported District Court opinions reproduced in the appendix to Shore Line's petition are similarly unpersuasive because of the factual situations and actual holdings involved.

The statement contained in the Report of the National Mediation Board cited in the Shore Line's petition (pp. 14-15) patently misstates the *status quo* provisions of Section 6 of the Act, gratuitously reading into the statute the limiting phrase "as expressed in agreements" to describe those rates of pay, rules or working conditions which the carriers are prohibited from altering. No such phrase appears in Section 6. Moreover, the statement was not made in connection with any proceeding before the Board, cited no authority, and amounts to no more than a conclusion of the author of the Report on an aspect of the Railway Labor Act over which the Board possesses no adjudicatory authority.

3. The decision below gives effect to the Railway Labor Act's primary purpose of avoiding interruptions to commerce in the railroad industry by placing upon management and labor alike certain mandatory requirements for the orderly settlement of their disputes.

In attempting to demonstrate the importance and far-reaching effect of the decision below, Shore Line argues (Petition, pp. 18-19) that it will interfere with and delay the railroad industry's "operational changes to promote efficiency and safety", and its efforts "to modernize its equipment and automate operations".

In effect these protestations are but an expression of irritation and impatience over the mandatory duty to bargain collectively, subject to "cooling off" periods, which

Congress has seen fit to impose not just on railroads but on industry in general.

The decision below does not operate to "obliterate rights of carriers." What is involved here is merely postponement of action which a carrier wishes to take, in order to permit consummation of the procedures which Congress has said must be followed in major disputes in the railroad industry, without undue influence or pressure being brought to bear by either party, and without frustration of the jurisdiction of the National Mediation Board with respect to the subject matter before it. Upon completion of the statutory procedures without agreement having been reached, either party is of course free to act unilaterally.

It is a well known fact that precipitous changes made by management in rules of employment or working conditions are frequently the cause of serious disputes between labor and management, and lead to strike threats and strike action. An interpretation of the Act which prevents management from changing an existing employment rule, condition or practice when such rule, condition or practice is currently the subject of collective bargaining, is essential to promote and achieve the ultimate purpose that the Congress sought to achieve when it enacted the Railway Labor Act.

CONCLUSION

For the foregoing reasons, it is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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